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No. 94-1669

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION, NEW YORK FARM BUREAU, INC., AND PENNSYLVANIA FARM BUREAU IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the court of appeals' narrow construction of the "normal farming" exemption set out in section 404(f) of the Clean Water Act, and its expansive construction of that section's "recapture" provision, fail to comport with the statute or its implementing regulations.

2. Whether the court of appeals' misconstruction of section 404(f) imposes intolerable burdens on farmers that Congress did not intend.

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION, NEW YORK FARM BUREAU, INC., AND PENNSYLVANIA FARM BUREAU IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm association organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and

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* Consents to the filing of this brief are on file with the Clerk.

Puerto Rico representing more than 4.4 million member families. Amici New York and Pennsylvania Farm Bureaus are members of AFBF, representing the interests of farmers and ranchers in their respective states.

AFBF and the state Farm Bureau amici have a direct interest in the outcome of this case. Their farmer and rancher members own or lease significant amounts of property, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. Amici's members' use of their land is severely restricted by the court of appeals' crabbed interpretation of section 404(f) of the Clean Water Act—an interpretation that eviscerates the Congressional exemption of normal farming activities from the burdens of the CWA's permit program. The Third Circuit's construction of the statute's exemption and recapture provisions expands the reach of the CWA far beyond what Congress intended, at best creating uncertainties about permissible conduct and at worst exposing farmers pursuing routine farming activities to substantial penalties.

Although the court of appeals' decision will have nationwide impact, amicus Pennsylvania Farm Bureau, which represents over 26,600 families in the Commonwealth, notes that it is of special and immediate concern to the approximately 5,800 farms located in northwestern Pennsylvania. The topography and quality of the land farmed by petitioner Brace is typical of that region, where poor drainage that diminishes crop productivity and yield is the norm. Similar conditions exist in portions of New York State, where amicus New York Farm Bureau represents over 25,000 member families. In the southwestern portion of Chautauqua County, New York, alone, hundreds of farms would be directly impacted by

the court of appeals' decision, as would thousands of farms statewide. The Third Circuit's misconstruction of the CWA harshly limits the ability of Pennsylvania and New York farmers to use historically proven soil management practices, thereby jeopardizing their ability to meet needed levels of feed crop production and casting doubt on the economic viability of both the farms themselves and the families who operate them.

Amici urge this Court to grant certiorari to correct the court of appeals' unjustified narrowing of a legislative exemption expressly intended to shield farmers and ranchers from excessive entanglement with bureaucratic agencies. We believe that amici's experiences with the operation of the statute and regulations at issue will be helpful to this Court in its disposition of this case.

SUMMARY OF ARGUMENT

1. In response to widespread concern that judicial construction of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, had expanded the reach of that statute into the everyday operations of the Nation's farmers and ranchers, Congress amended the Act to exempt "normal farming, silviculture, and ranching activities" from the general requirement that a permit be obtained to discharge dredged or fill material into the navigable waters of the United States. 33 U.S.C. § 1344(f)(1)(A). The language and structure of the amendment, as well as of its implementing regulations, indicate an intention to create a broad exemption. The Third Circuit's narrow construction of the exemption and expansion of the recapture provisions of CWA section 404(f) does not comport with the relevant statutory or regulatory language, the legislative history, or practical realities.

Congress apparently intended that farmers run the gauntlet of the permitting process when incorporating new tracts of *non-farm* wetlands into the farming process. However, Congress most certainly did not intend that federal regulators would require a permit every time a farmer wishes to change exactly which part of his existing farmland is used as pasture and which part is used for growing row crops. The court of appeals' misconstruction of section 404(f) ignores the natural reading of the statutory text, eviscerates the careful balance struck by Congress between protecting wetlands and sparing farmers the burdens of a bewildering regulatory process, and extends the reach of the CWA far beyond that envisioned by Congress.

2. By incorporating an exemption in the 1977 amendments to the CWA, Congress endeavored to simplify the regulatory burdens on farmers by keeping the Army Corps of Engineers ("Corps") out of routine decisions about the most productive and efficient uses of their land. So long as farmers engaged in normal preparatory, productive, and maintenance activities, they were to be free from the regulatory process. The actions of overzealous bureaucrats have undermined the implementation of Congress' plan, imposing intolerable demands on hard-working American farmers.

3. The CWA's statutory and regulatory scheme imposes restrictions on the beneficial use of land that constitute takings for which just compensation must be paid under the Fifth Amendment. The court of appeals' decision, by narrowing section 404(f)'s normal farming exemption, will lead to an increase in regulatory takings and hence threatens to impose a significant additional burden on the public fisc that Congress did not contemplate. This serious, yet unforeseen, constitutional

implication offers further evidence that the court of appeals erroneously construed the scope of section 404(f) in this case and presents a compelling reason for this Court to grant certiorari.

ARGUMENT

I. THE THIRD CIRCUIT'S CONSTRUCTION OF SECTION 404(f) DOES NOT COMPORT WITH THE TEXT OF THE STATUTE OR ITS IMPLEMENTING REGULATIONS

This case squarely presents an important issue of federal law with significant practical consequences. In 1977, Congress made a deliberate policy choice to exempt the ordinary activities of farmers and ranchers from the costly and burdensome requirements of the Clean Water Act section 404 permit scheme. Now, the court of appeals in this case has seriously narrowed the scope of the exemption for "normal farming * * * activities" while simultaneously expanding the reach of the statute's so-called "recapture" provision. In so doing, it has extended the scope of the permit requirement far beyond that intended by Congress.

This overreaching has significant adverse consequences for all American farmers. It interrupts long-established farming practices, adding a new layer of regulatory costs and compliance requirements. It prevents farmers from enjoying the full entitlements of property ownership. And, ironically, it spawns precisely the regulatory nightmares from which Congress intended to protect farmers when it amended the CWA in 1977. These results are not what Congress had in mind, and this Court should now intervene to reinstate the intended breadth of the normal farming exemption.

A. Congress Specifically Amended Section 404 To Exempt Ordinary Farming Activities From The Burdensome CWA Permit Scheme

When water collects "at a frequency and duration sufficient to support * * * a prevalence of vegetation typically adapted for life in saturated soil conditions," it may be classified as "wetlands," even if the water sits on private property. 33 C.F.R. § 328.3(b) (1994). However, controlling surface and subsurface water to ensure a sufficient though not overly abundant supply is critical to successful farming. Thus, it is not surprising that the wetlands protection program enacted in section 404 of the Clean Water Act of 1972 engendered considerable controversy between the government and the agricultural community when a district court ruled that the jurisdiction of the Act extended to waters far beyond "the traditional tests of navigability" and could reach ordinary farmland. See *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

The expansive reach of the Act threatened to impose a permit requirement on enormous numbers of farmers whose land occasionally contained standing water. Section 404 became "a symbol to many Americans of how a well-intentioned legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country." 4 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act* ("*Legislative History*") 902 (1978) (statement of Sen. Bentsen). As the chairman of the Senate Committee on Environment and Public Works observed, the complaints

of farmers and ranchers evinced "widespread concern that many activities that are normally considered routine would be made extremely difficult because of the complex regulatory procedures." *Id.* at 897 (statement of Sen. Randolph).

These concerns led in 1977 to amendments to the Act that provided "for the first time statutory recognition that normal farming, ranching, and silviculture activities do not belong in this permit program." 3 *Legislative History* at 351 (statement of Rep. Hammerschmidt). Congress provided that no permit is required for "the discharge of dredged or fill material" either "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting * * * or upland soil and water conservation practices," or "for the purpose of construction or maintenance of * * * irrigation ditches, or the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C). On the other hand, a "recapture" provision stipulated that a permit was required for discharges of dredged or fill material "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." *Id.* § 1344(f)(2).

These amendments, as the Seventh Circuit has observed, created "a delicate balance of exceptions that protected wetlands while permitting routine activities to go on unimpeded." *United States* v. *Huebner*, 752 F.2d 1235, 1241 (7th Cir.), cert. denied, 474 U.S. 817 (1985). Congress thus made a deliberate policy choice that "[t]he upland farming, forestry and normal development activity carried out primarily by individuals and as a part of a family business or family farming activity

need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters." Senate Report No. 370, quoted in 4 *Legislative History* at 644. As Senator Muskie, one of the principal Senate sponsors, explained, "[t]he drainages exemption is very clearly intended to put to rest, *once and for all*, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainages." *Id.* at 1042 (emphasis added). In this case, the court of appeals has required a permit for *precisely* the "draining [of] poorly drained farm[land]" that Senator Muskie explained was to be exempt.

B. Application Of The Normal Farming Exemption Requires A Contextual Analysis Of The Total Activities Of A Farming Operation

The court of appeals, rubber-stamping the interpretation of overzealous regulators, construed the statutory exemption and its implementing regulations very narrowly. It ruled that a farmer who converted to crop-bearing use a wetland part of his farm that had long been used as pasture is not entitled to the exemption for "normal farming * * * activity." To reach this surprising result, the court had to subdivide the farmer's parcel and operations, focussing on the change in use of the affected wetland pasture rather than on the continuing agricultural use of the farm as a whole.

Other courts, in contrast, have undertaken a contextual review of the total activities of a farming operation to determine whether the exemption for "normal farming * * * activity" is applicable. See *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 926 (5th

Cir. 1983); *United States* v. *Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166, 1175 (D. Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 484 U.S. 1061 (1988).

This contextual approach best reflects the language chosen by Congress, which broadly exempts "normal farming, silviculture, and ranching activities." 33 U.S.C. § 1344(f)(1)(A). It is consistent, moreover, with regulations amplifying the activities that are exempt from the permit requirement, which do not narrow the exemption but rather mirror the breadth of the statutory text. See 33 C.F.R. § 323.4(a)(1)(i) (exempting "[n]ormal farming, silviculture and ranching activities"); *id.* § 323.4(a)(1)(ii) (the exemption reaches "established (i.e., on-going) farming, silviculture, or ranching operation[s]" and excludes "[a]ctivities which bring an area into farming, silviculture, or ranching use"); *id.* § 323.4(a)(1)(iii)(C)(2) (noting that "minor drainage" does not include drainage associated with the conversion from one wetland use to another and giving as an example conversion from "silviculture to farming"). Neither the statutory nor the regulatory language gives any indication that there are subclasses of a farming operation to which courts should look in delineating the scope of the exemption.

An examination of the examples of normal farming activities enumerated in section 404(f) lends further support to the view that Congress did not intend courts applying the exemption to manufacture artificial distinctions in land usage (such as between pasturing and growing row crops) within the same integrated farming operation. The listed activities include *land preparation* (plowing, seeding), *production* (cultivating, harvesting),

and *maintenance* (drainage and conservation). 33 U.S.C. § 1344(f)(1)(A). Contrary to the Third Circuit's holding, there is absolutely no indication that Congress regarded the precise nature of a farmer's actions within this wide range of conduct as determinative of the exemption's applicability.

Congress understood the frequency with which farmers can (and often must) diversify their operations to achieve maximum output and efficiency. For example, it is common—and indeed very efficient—to combine pasturing with raising row crops that produce feed for the farm's livestock. It also is common for farmers to alter the mix of planting and pasturing as their needs develop, as soil fertility and nutrient levels change as a consequence of current and past use, as markets evolve, and as personal resources expand or contract.[1]

Planting and pasturing—the two activities for which petitioner Brace used the land in issue—are simply subsets of the myriad activities that comprise "normal farming," and they often occur in tandem or in succession on the same farm. Acknowledging this reality, the statute and regulations give farmers flexibility to operate within the broad categories of activities (farming, silviculture, and ranching) to which the section 404

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[1] The transition from one farming use to another (for example, from pasturing to growing crops) often occurs over a period of years. Preparatory activities, which may include draining and plowing, still constitute normal farming activities and indicate that the area in transition has neither "been converted to another [non-farming] use" nor "lain idle" so as to deprive a farmer of the exemption. See 33 C.F.R. § 323.4(a)(1)(ii).

exemption applies, without worrying that the choice between one sort of farming activity and another on a given piece of land may result in a CWA violation. The Third Circuit's ruling that it is the *particular* existing use of a portion of a farm that counts in determining if the normal farming exemption applies, not the fact that the land is *part of a continuing farming operation*, destroys this very necessary flexibility and for practical purposes destroys the exemption.

The Third Circuit also wrongly construed the recapture provision of section 404(f) to extend the reach of the CWA into normal farming activities that Congress intended to leave alone.[2] That provision requires permitting for activity that "bring[s] an area of the navigable waters into a use to which it was not previously subject." 33 U S.C. § 1344(f)(2). The statute provides no further elaboration on the meaning of "use," and the conflicting provisions of the implementing regulations simply confuse matters.

On the one hand, the regulations appear to adopt a broad and flexible approach to farming "uses" and "activities" by specifying that "a permit will be required for the conversion of a cypress swamp to some other use *or the conversion of a wetland from silvicultural to agricultural use*." 33 C.F.R. § 323.4(c) (emphasis added). This provision implies that a conversion from one agricultural use to another—for example, from

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[2] As Petitioner notes, only one other court of appeals has applied the recapture provision to previously farmed land being converted from a wetland farming use to a non-wetland farming use. *United States* v. *Akers*, 785 F.2d 814, 820 (9th Cir.), cert. denied, 479 U.S. 828 (1986).

pasturing to growing row crops—would avoid the recapture provision. On the other hand, the regulation also states categorically that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." *Ibid.*

This latter provision lacks textual or structural support in the CWA, is inconsistent with related regulatory provisions, and, more importantly, conflicts with the intent of Congress. See *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) ("The question * * * is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations"). Every indication in the statute and regulations, save this one, points to "farming, silviculture, or ranching"—not to "wetlands or non-wetlands"—as the relevant frames of reference for the application of the recapture provision.

Moreover, the legislative history makes clear that Congress did not mean to interfere with the integrated operations of family farms by requiring a permit every time a farmer reconfigures the mix between pasturing and row crops. Congress, as Senator Muskie pointed out, well understood that "draining poorly drained farm[land]" would affect a substantial hydrological alteration to "millions of acres" nationwide. 4 *Legislative History* at 1042. Yet, as the Senator stated, the 1977 amendments established "once and for all" that no permits are required for such activities. *Ibid.* Accordingly, the Third Circuit's contrary ruling notwithstanding, the recapture provision of section 404(f)(2) does not remove active and ongoing farming operations from within the ambit of the normal farming exemption

merely because there occurs a change from one farming use to another.

II. THE THIRD CIRCUIT'S MISCONSTRUCTION OF SECTION 404(f) IMPOSES INTOLERABLE BURDENS ON FARMERS

The court of appeals' construction of section 404(f) to require farmers to obtain a permit to convert wetland pasture into crop-bearing fields imposes significant financial and administrative burdens: loss of time completing bureaucratic paperwork, legal fees, delay and uncertainty, potential fines, and loss of productive land—all costs that will either make farming less profitable and thus less desirable as a livelihood and investment, or will drive up the prices charged to consumers for food and other basic necessities. The administrative nightmare associated with the CWA's permit scheme often deters farmers from even applying for a permit and discourages all but the most determined from challenging a permit denial in the court system.

Congress envisaged no such consequences when it amended the CWA. The legislative history is replete with statements showing Congress intended that the exemption scheme would give farmers real protection. As of 1977, section 404 "ha[d] become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism." 4 *Legislative History* at 903 (statement of Sen. Bentsen). Congress undertook to amend the CWA to reflect "the fact that we never intended under Section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, [and] people involved in forestry." *Id.* at 924 (statement of Sen. Domenici). The resulting exemption of normal farming activities from the permit

requirement, Congress hoped, would "greatly simplify the administrative process and reduce the potential redtape burden." *Id.* at 897 (statement of Sen. Randolph).

Implementation of the exemption has not proceeded as Congress intended, as this case perfectly illustrates. As the Corps has put a stranglehold on what heretofore have been regarded as ordinary farming activities, farmers have been left "angry, afraid, confused and amazed because of the things that government is doing to them." Grant, *Don't Tread on Me*, Beef Today, April 1994, at 20.

To begin with, the Corps' inefficiency in processing permit applications is legendary. A February 1994 study found that in 93 percent of the cases the Corps took far longer than the 60 days allowed to evaluate individual permit applications—indeed, took on average *373 days*. In large part because of these delays and permit-related expenses, over half the applications submitted between 1988 and 1993 were withdrawn. In one particularly stunning example, an application involving just 26 square feet of wetland was withdrawn after 450 days without a disposition. The study concluded that "those who criticize the 404 program for excessive delays in the permitting process are not just crying wolf; it takes the average applicant with a wetlands project a long time to get a permit decision." Albrecht & Goode, *Wetland Regulation in the Real World*, Land Rights Letter, July/August 1994, at 13.

Other horror stories about the Corps' excesses abound:

- A California family purchased property to plant grapes for their winery. To help pay property taxes,

they planted hay on the remaining acres of their parcel. Some of the property was wetland. An attorney advised them that they were exempt from the CWA permit requirement because their land had been used for growing hay since the 1930s and more recently for grazing cattle. Aerial photographs and an affidavit from the farmer who had planted the field for over 40 years were insufficient to deter the Corps, which continued to insist that the family had violated the CWA. Letter from Edward R. Bunting to Rep. Lynn Woolsey, *reprinted in* Land Rights Letter, July/August 1994, at 5.

- In the Dakotas and Minnesota the tightening grip of federal regulators has caused farmers to stop draining the "potholes" that dot farms in the region. Now known as "farmed wetlands," these areas no longer can be altered to maximize the utility of the land, even though they tend to be dry in many years. Gullickson, *The War of the Wetlands*, The Farmer/Dakota Farmer, December 1994, at 5.

- Farmers in the Upper Midwest "have found that government red tape is rampant in appealing wetland designations," and are still more stunned by the steep penalties for noncompliance with regulations, even for good-faith violations. *Ibid.*

- Brian Odden, a South Dakota farmer, learned that something as minor as plowing a furrow across one of his fields could cost thousands of dollars in penalties through reduced federal farm payments. Mr. Odden believed that he was merely turning under weeds that accumulated after heavy rains in 1993, but federal wetlands regulators cited him because the furrow allegedly allowed water to drain

from a nearby wetland. Walker, *Wetlands Regulations Often Confuse, Anger Many Farmers*, Sioux Falls Argus Leader, August 4, 1994, at A1.

- State authorities designated 75% of John and Josephine Bronczyk's 160-acre Minnesota farm as a "public water wetland." This designation imperiled their property rights, limiting their use of their land and giving the public, including hunters, a right to walk within 200 yards of their home. *Property Rights: Public Access to Wetland Prompts Lawsuit*, 4 Greenwire 5 (December 20, 1994).

These examples—and we could multiply them hundreds of times over—demonstrate that current interpretation and administration of the section 404 exemption, permit, and review processes have not fulfilled Congress' aim of minimizing the interference of federal regulators in the routine decisions of family farmers. They provide a glimpse into the havoc wreaked by bureaucrats and acquiesced in by the court of appeals in this case. These are not stories about individuals and corporations indiscriminately filling in wetlands, or about farmers seeking to incorporate new tracts of non-farm wetlands into the agricultural process. In those situations, Congress meant for the permitting process to apply. Rather, these vignettes simply detail the plight of hard-working American farmers trying to work their existing farm operations as efficiently as they can. Congress cannot have intended that such routine farming be swept into the labyrinth of CWA permitting.

III. THE THIRD CIRCUIT'S EVISCERATION OF THE NORMAL FARMING EXEMPTION HAS SERIOUS CONSTITUTIONAL TAKINGS IMPLICATIONS

The court of appeals' cramped construction of the normal farming exemption threatens wholesale takings of farmland for which just compensation must be paid under the Fifth Amendment of the Constitution. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) (noting that where the Corps "denie[s] respondent a permit to fill its property, respondent may well have a ripe claim that a taking has occurred"); Clark, *Wetlands: Compensation for "Taking" by Denial of the Section 404 Permit*, 29 Idaho L. Rev. 41 (1992/1993); Klock & Cook, *The Condemning of America: Regulatory "Takings" and the Purchase by the United States of America's Wetlands*, 18 Seton H.L. Rev. 330 (1988); Note, *It's Not Easy Being Green: The Judicial View of Government Takings of Private Wetlands*, 2 Fordham Envtl. L. Rev. 155 (1991).

The harsh economic impact of not being able to work sections of one's farm hardly needs elaboration, particularly in the context of a long-established and ongoing farming operation like Mr. Brace's, where significant investment-backed expectations are frustrated. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124, 127 (1978). And certainly most farmers had no reason to expect, when they began farming their land, that the government later would tell them that they could not convert a pasture into a field of row crops. See *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992) (observing that farmers'

reasonable expectations have "a rich tradition of protection at common law").

Given the potential for a plethora of Fifth Amendment takings claims by farmers denied the beneficial use of their property for something as routine as converting a pasture into a field of row crops, it is appropriate for this Court strictly to scrutinize judicial and regulatory interpretations of the exemption and recapture provisions of CWA section 404(f). See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988) (narrowing agency's construction of statute that gives rise to "serious constitutional concerns"); *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (construing statute to defeat administrative order that would give rise to takings). As we have demonstrated, the Third Circuit's ruling cannot survive such scrutiny. We urge this Court to grant certiorari to correct the court of appeals' error and to restore to the normal farming exemption the broad scope originally intended by Congress.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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